Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES OF AMERICA

No. _____

Heirs And Beneficiaries Of Marjorie C. Schneller, James D. Schneller, trustee ad litem; Estate Of Marjorie C. Schneller, James D.Schneller, trustee ad litem; Estate Of Marjorie C. Schneller, Marjorie Zitomer, personal representative; Estate Of George H. Schneller, James D. Schneller, personal representative

v.

Able Home Care Inc., Marianne Lilienthal, Holly Nelson, Jane Doe 1, respondents

James D. Schneller, petitioner

PETITION FOR WRIT OF CERTIORARI

On Petition of Plaintiff James D. Schneller for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at No. 10-1681

James D. Schneller pro se
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I. QUESTIONS PRESENTED

I. The Third Circuit has repeated an error of great proportions in summarily affirming a dismissal in a cause of action that was already dealt substantial error in a prior affirming. The limits of a circuit court's ability to summarily dismiss have been breached or are unconstitutionally broad, and the constitutionality of Third Circuit L.A.R. 27.4 is questioned.

II. The Third Circuit has failed to address, or has caused absence of review, of an integral and substantial question of disqualification of the deciding trial judge. Review is requested of the apparent affirming of the District Court denial of motion to recuse.

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To the Justices of the Supreme Court:

Petitioner James D. Schneller, representing himself, on behalf of all plaintiffs, requests a writ of certiorari to the Third Circuit Court of Appeals, and relief in the alternative, stating as follows :

II. PARTIES

All parties appear in the caption of the case on the cover page.

III. JURISDICTION

This petition is taken from a decision of a United States Circuit Court of Appeals. The date on which the United States Third Circuit Court of Appeals decided this case was July 26, 2010.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

Petitioner has raised his objections and arguments in regard to the issues presented in this

petition, in the proceedings below. Petitioner raised all issues including the within questions, in the pleadings which he presented to the trial Court, making certain to preserve any issues, due to lack of hearing and failure of the defendants to appear, in the motion for relief from the order and for recusal, and the motion for leave to appeal in forma pauperis. Petitioner raised all issues to the best of his ability in the Circuit Court, although the surprise element of early dismissal causes the District Court record to be crucial in this appeal. Likewise in the District Court, due to unexpected brevity of the proceedings, petitioner was forced to preserve some elements in the motion for reconsideration. Respondents through prompt service were afforded an opportunity for response by respondents.

IV. OPINIONS BELOW

The United States Court of Appeals for the Third Circuit decided this case in a non-precedental opinion, dated July 26, 2010. (Exhibit A)

The District Court for Eastern Pennsylvania did not enter any opinion or memorandum order in this case.

V. STATEMENT OF THE CASE

1. Plaintiffs, a caregiver son, ("petitioner"), the estates of his deceased parents, through petitioner, on the paternal estate, and the executrix, on the maternal estate, and the wrongful death beneficiaries, of which petitioner is one, filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania ("District Court") with a motion to proceed in forma pauperis, on February 27, 2008. Plaintiffs allege extraordinary deprivals of rights, and conspiracy to so inflict, against a home nursing agency, their manager-owners, and an employee of the agency, who failed to call an ambulance despite onset of severe medical emergency to an elderly care dependent woman. State torts and intentional torts are also claimed.

2. The District Court in the order entered on March 11, 2008 (Exhibit H), denied plaintiffs' leave to proceed in forma pauperis "for the reason that he has the financial means to pay the $350 filing fee" and finding after a "preliminary review", a lack of jurisdiction. Petitioner was able to save the fee, and paid the fee on April 8, 2008.

3. The District Court in the Order entered on November 13, 2008 (Exhibit G) ordered plaintiffs' motion for extension of time for service filed on June 26, 2010, denied, "as moot", for reason that the complaint was "dismissed" "on March 10, 2008" and that plaintiffs had failed to file a timely appeal. Plaintiffs filed, on November 28, 2008 a timely motion for relief from said order, asking that the order be vacated, for reasons including that the complaint had not been dismissed, and plaintiff had paid the filing fee. Summonses had in fact been issued and plaintiff was preparing to file motions for default judgment for failure to file answers.

4. The District Court then entered orders which denied the motion for relief, and denied the motion to appeal in forma pauperis. (Exhibits F & G) Plaintiff's motion to proceed in forma pauperis in the Third Circuit Court of Appeals ("3d Circuit"), No. 09-1716, was granted but the Circuit court clerk submitted the appeal "to a panel for determination under 28 U.S.C. Section 1915(e)(2) or for summary action under Third Circuit L.A.R. 27.4 and I.O.P. 10.6." A panel of the Third Circuit then dismissed the appeal without prejudice, in a two sentence order, misquoting the single authority to find: " Any appeal from an order denying pauper status on appeal will not be entertained and shall be dismissed sua sponte. Callihan v. Schneider, 178 F.3d 800,

(1999)" Rehearing was denied. (Exhibits D & E), as were petitioner's request to pay the filing fee as permitted by law, and motion to overrule the Clerk's refusal to accept the fee, all of this despite the fact that the prominent decision actually stated in Callihan, directs that filing fees must be paid within thirty days of a district court's certification that an appeal in forma pauperis (IFP) would not be taken in good faith. This issue did not and could not have arisen.

5. Defendants, who took no part in the case at all, had participated in a State Court case which ended in a similarly illegal and unjust manner, and were served all pleadings of record in all cases.

6. The above matter was the subject of petition for writ of certiorari No. 10-144 which was denied on October 4, 2010.

7. Plaintiffs, during the appeal, timely filed a new complaint in the same cause of action pursuant to Pennsylvania's savings statute, which allows refiling of suits that are not dismissed on the merits within one year of termination of the prior suit. 42 Pa.C.S. §5535. Petitioner verbally requested that the case not be assigned to the same Judge which was denied.

8. The order denying petitioner's concurrently filed motion to proceed in forma pauperis also decided that the case was dismissed, finding in

footnoted reasons that allegations of constitutional violations pursuant to 42 U.S.C §§ 1983, 1985(2), and 1985(3) were invalid due to there being no state actors involved, and that the case was untimely, pursuant to Pennsylvania statutes of limitations prescribed for personal-injury actions. (Exhibit C)

9. Petitioner's motion for relief from the order dismissing the case, and request for disqualification, was denied, (Exhibit B) the latter denying petitioner's claims that the Judge's impartiality could reasonably be questioned and that a reasonable person, knowing all of the facts and circumstances, could observe express bias and impartiality.

10. Plaintiffs' motion to appeal in forma pauperis was granted, but, as in the prior case, the appeal was directed by the clerk to be considered for possible summary action pursuant to the local rule under 3d. Cir. LAR 27.4 and I.O.P. 10.6. Plaintiffs wrote the Clerk objecting to said directive stating, inter alia, lack of any compromising deficiency in the appeal nor the trial Court docket, supportive of negative summary action; the lack of a substantial level of legal question, as is required for sua sponte action; and also the fact that the issue of possible lack of capacity to represent the estates, was a matter for the merits panel, because the counts pressed by plaintiff himself were substantial, and all of the

above was present with no pleadings ever filed by the defendants.

11. After no action by the clerk, plaintiffs filed a statement of jurisdiction as was permitted in said directive, claiming substantial error in and beyond any seemingly substantial question as to jurisdiction, attaching a copy of their trial Court motion for reconsideration and disqualification, and claiming that the findings in the Order appealed from were overtly selective, which exhibited bias.

12. The Third Circuit in a non precedental per curiam opinion affirmed the district court, deciding that summary action was appropriate because "no substantial question" was present, erroneously applying a 28 U.S.C § 1915 standard despite the fact that the fee had been paid, and sua sponte re-designating the order denying forma pauperis as one "granting forma pauperis, and dismissing under 28 U.S.C § 1915 (e)(2)(B)."

13. Petitioner now appeals to this Court.

VI. REASONS FOR GRANTING THE WRIT

I. **The Third Circuit has repeated an error of great proportions in summarily affirming a dismissal in a cause of action that was already dealt substantial error in a prior affirming. The limits of a circuit court's ability to summarily dismiss have been breached or are unconstitutionally broad, and the constitutionality of Third Circuit L.A.R. 27.4 is questioned.**

The Third Circuit decision to affirm, and to summarily preclude a full review, relies on vagueness, and a mix of law and fact that is inappropriately selective.

Court of Appeals' review of district court's order dismissing case filed in forma pauperis is plenary. Johnson v. Rodriguez, C.A.1 (Mass.) 1991, 943 F.2d 104, rehearing denied, certiorari denied 112 S.Ct. 948, 502 U.S. 1063, 117 L.Ed.2d 117.

The most egregious error prominent in this decision is the district court's molding of a possible lack of jurisdiction based on "preliminary review", stated in denial of a forma pauperis application, and

made without the parties participating, into a "dismissal" arbitrarily decided at the time of deciding the first motion, filed after payment of the filing fee. A nonfrivolous, nonmalicious complaint may not be dismissed or prevented from being filed solely because of plaintiff's inability to pay court costs. Moon v. Newsome, C.A.11 (Ga.) 1989, 863 F.2d 835, rehearing denied 874 F.2d 821, certiorari denied 110 S.Ct. 180, 493 U.S. 863, 107 L.Ed.2d 135, rehearing denied 110 S.Ct. 380, 493 U.S. 960, 107 L.Ed.2d 364. Petitioner gathered the fee and paid it, yet the complaint has been prejudged, probably under the forma pauperis standard, and is ended as if payment was not or could not ever occur.

The Third Circuit then decides to "construe" this order as a grant of forma pauperis, and a §1915 dismissal. A prominent result of this construing is that the substantial error underlying the district court order appears to be washed clean, laying the path for an affirming based more on plaintiffs' ability to respond rather than reasons of fact and law. Even pragmatically the conclusion leaves ends dangling. If the re-designation was appropriate, ought not plaintiffs be refunded their filing fee ? What of the typical opportunity to amend ? Court is obliged to construe pro se pleadings and papers liberally.

LaBounty v. Adler, C.A.2 (N.Y.) 1991, 933 F.2d 121, on remand.

The circumstances in legal reality are far different. The district court, in deciding to dismiss, decided in stark conflict with two decisions granting reversal of the district court, by the Third Circuit, in 2008, in the exact same circumstances. The judgments reversed sua sponte dismissals (for lack of a better word) for reason of lack of jurisdiction, with instructions to bring the defendants into the action and direct plaintiff to file amended complaints.

The argument is strong for reversal and in support of review by the Court of certain legal issues. The regional courts' findings of fact are fraught with error, such as their echoing the district court regarding the first action: "but the District Court noted that it had already dismissed the case and Schneller had failed to appeal. Several months later, Schneller filed a motion for leave to proceed IFP on appeal, . ." Here the Third Circuit has found for at least three facts that are plainly evident to be untrue: 1) prior dismissal, 2) failure to appeal, and 3) possible delay in filing motion to appeal IFP. They fail to state that no delay occurred in filing for leave to appeal IFP, rather, it was the awaiting of action on the motion for extension of time to serve.

Perhaps encouraged by the district courts' statement that the forma pauperis application had a 'copy of the complaint attached " that was " a copy of the complaint filed against the same parties in early 2008. Sec 08-cv-1003, " the Third Circuit has now, though admitting the complaint was not available to them, found that the complaint is the "identical complaint" as the first. While they are nearly identical, any inference that plaintiff simply attached the same complaint is untrue and prejudicial, as can be seen in the Third Circuit's choice of words. The crucial difference is that plaintiff added a paragraph to the jurisdictional statement stating jurisdiction under "42 Pa.C.S. §5535, the day of filing falling within a year of closing of a prior case in the same matter, which was a termination not made on the merits of the case."

This misapprehension of fact is substantial, despite the brevity of the orders in both Courts, and despite the fact that that brevity was strong reason to make the findings and conclusions therein, accurate, in the interests of fairness and justice. Abuse of discretion like this appears at numerous turns in this appeal and petitioner seeks review naturally for, at the least, a reversal or remand, so that an impartial and realistic determination could result.

Abuse of discretion is seen in the circuit court's finding beginning with "Much of the confusion in this case . ." No mention of confusion has ever been previously stated. Bias is clear because the circuit is mischaracterizing, and is doing so regarding an untrained pro se, so that the opinion is tainted with intimation of ineptitude, and under circumstances where the decision is inflicting an inappropriate summary standard and an inappropriate forma pauperis standard.

The Circuit Court errs increasingly. Observing at this point the district court's error in reaching the merits after declaring plaintiffs able to pay the fee, they proceed without justification, nor any cited authority, to sua sponte construe this order as a grant of forma pauperis, and a §1915 dismissal. Legal conclusions like this in the opinion are abuse of discretion, and warrant in full a reversal of the affirming order. Abuse of discretion occurs in the opening insinuation that dismissal is appropriate because there may be " . . no "substantial question." See 3d Cir. LAR 27.4 & I.O.P. 10.6." (Exhibit A - P.4) Regardless of whether §1915 is applicable, if it was, purpose of this section is to provide an entre, not a barrier, to the indigent seeking relief in federal court. Souder v. McGuire, C.A.3 (Pa.) 1975, 516 F.2d 820.

The Circuit court admits that the district court failed to docket the complaint yet they were fully warranted to remand for that purpose, and to admonish the district Court as well. Abuse of discretion is claimed because none of this happened despite the error-prone nature of the proceedings, and the serious allegations present in the complaint. Now, they may have heeded the fact that the complaint was very similar to that filed in the prior case appealed at No. 09-1716, and viewed that complaint electronically, and if they have done so, their echoing of the district court's jurisdictional and civil rights arguments is factual and legal abuse of discretion.

Abuse of discretion is evident because manifest injustice was clear and yet the trial Court did not grant reconsideration, nor did the circuit Court reverse. The injustice and error of law is pronounced and evident to any person.

Constitutionality of Local Rule Questioned

The Third Circuit local rule of appellate procedure LAR 27.4 entitled Motions for Summary Action states in full: "A party may move for summary action affirming, enforcing, vacating, remanding, modifying, setting aside or reversing a judgment,

decree or order, alleging that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action. In addition, the court may *sua sponte* list a case for summary action.

This local rule LAR 27.4 does not support the construing of a forma pauperis denial as a granting of leave to proceed IFP and dismissing his complaint under 28 U.S.C. § 1915(e)(2)(B) in any analysis, and doesn't support the circuit court's segue into affirming the district court's improper legal basis for lack of jurisdiction.

But the language of the rule has encouraged the Third Circuit to take liberties with pre-appeal analysis and to deliver a grossly unjust affirming despite their knowledge that a prior affirming was even more unjust. Moreso, the Third Circuit has utilized the broadness of the Rule to infuse a forma pauperis standard into their review that actually doesn't exist, because plaintiffs paid the complaint filing fee, and were granted forma pauperis on appeal, causing the appeal to reside in the Third Circuit without any forma pauperis aspect.

The trial Court has approved forma pauperis, rather than deny it, or deny it with a declaration of frivolousness. With this rule, three or four opportunities are thus in place for scrutiny of a case

involving a forma pauperis application, and petitioner's case is being subjected to these despite the actual inapplicability of them, all the more with the contested rule being so broad and vague. The Third Circuit was warranted if noting that forma pauperis may have also been approved in order that the Circuit review the matter under the stricter standard sometimes available for deciding forma pauperis issues, and thus avoiding that aspect entirely, rather than let it seep into their review.

The contested Rule now has added a lane for summary disposition and the absence of appropriate restriction in the Rule has even permitted the Clerk to affect the appeal negatively. Defendants' intentional absence greatly heightened the burden to be met for sua sponte intervention, especially in light of plaintiffs candor and verity and the seriousness of the complaint. Plaintiff is claiming the discovery rule, equitable tolling, and continuing violation, so absence of opposing parties has prevented the development of a record in this regard.

The Rule appears to have assisted in easing said burden inappropriately, and this has a potential for repetition in an untold number of cases in the future. The Rule can cause District Courts to grant forma pauperis for the inappropriate reason of causing the infusion of summary and/or §1915 standards of review into the appeal, to the benefit of

affirming rather than fairness.

The rule, in it's provision for sua sponte action, and language warranting summary action for "a change in circumstances", places review of a given case in an overly sensitive position, and a position subject to arbitrariness and ministerial prejudice. The Clerk of the Circuit court was requested in writing to remove the designation of this appeal as falling under Rule 27.4, and given abundant reason. By failing to do so the clerk proved their own bias and obdurateness, by refusing to adhere to the common principle that they enter not into any decisions regarding subjective matters but rather only the ministerial. The circuit was required to balance the Clerk's partiality yet rather, has intensified it, which is a further abuse of discretion.

Among the multitude of errors, not comprehensively listed in this section, there is also the prominent fact that the Third Circuit has decided in conflict with two prior decisions it issued, in which reversal was ordered, as is hoped for in this case, because the defendants, although served diligently, had not participated in the proceedings. The backgrounds between these cases (and a fourth case[1])

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[1] Petitioner had earlier appealed the affirming of denial of forma pauperis in a case filed and decided

are extremely similar, including the same district court Judge's manner of handling of denial of forma pauperis, and his subsequent declining to accept jurisdiction upon payment of the fee. Schneller v. Crozer Chester Med. Ctr. , 276 F. App'x 169, 170 n.1 (3d Cir. 2008); Schneller v. Fox Subacute at Clara Burke, 317 F. App'x 135, 137 n.1 (3d Cir. 2008)

The circuit court has, in fact, listed these two cases in the opinion, in respect to the capacity to sue issue (P. 4), yet they avoid mention that, in the very issue that is prominent in this case, those cases survived by a reversal, in the same circumstances, including the capacity to sue circumstance now apparently stated in support of a sort of summary affirming. They instead cite Oatess v. Sobolevitch, 914 F.2d 428, 430 n.5 (3d Cir. 1990) ('district court might, sua sponte, raise the issue of the deficiency of a complaint under Rule 12(b)(6), so long as the plaintiff is accorded an opportunity to respond," which is a factual and legal background unlike this case, and reliance on which ignores said prior decisions and applies a standard to pre-appeal dismissal that is unconstitutional in it's broadness and availability to Courts despite pro se and forma pauperis plaintiffs' standing as a class that is

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with said two cases, to this Court, hoping that all three denials of forma pauperis would be reviewed. No. 06-10163, certiorari denied May 21, 2007.

subjected to daily, wrongful obstruction and retaliation by a justice system that has lost sight of the rights guaranteed to access to Courts and to full and fair adjudication even if representing oneself. Rule 27.4 and decisions like Oatess are a dangerous combination for the beleagured litigant. USCA Const. Article III s.2 Article IV s.2, Amend VII

The additional error weighted upon plaintiffs in the appeal, such as discussed in the next section, further this case for an unconstitutionality and invalidity of 3d Cir.LAR 27.4.

Reversal Is Warranted Due To Patent Unfairness

Petitioner with caution presents other examples of substantial error, and at the same time makes reference to the motion for rehearing in the prior petition in this matter denied three weeks ago, No. 10-144. Petitioner did not petition the Court to consolidate the two petitions because, since he is a candidate for office, he was unable to prepare this petition prior to the distribution of the earlier petition in late September, because election day is

November 2 and petitioner has no assistants nor attorneys for his personal business[2].

The Third Circuit also errs egregiously in their findings that plaintiff participated sufficiently for a showing of due process, and participated to no avail, in the proceedings. In the district Court, the availability of a motion for reconsideration was in no way an availability of access to justice and a fair determination. Plaintiff cleared the hurdle of paying the fee, only to find a swordlike law of the case delivered, against all logic and principles of justice. The Third Circuit had a duty to more fairly heed that motion for reconsideration perhaps, but they instead now deliver a summary, unfair affirming.

The Third Circuit's language reveals their intent to selectively make a case against petitioner, finding the petitioner's responses to be: a not disputing (P.2 footnote), a not offering of any factual basis (P.3 last line), and to constitute "several opportunities" to respond (P.5) in the trial Court. Thus the deciding Courts are deemed to have been presented with the

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[2] Petitioner was urged to exercise caution by the Supreme Court and was permanently refused forma pauperis, in January 2009, after seeking appeal and emergency relief regarding the eligibility of Barack Obama for office. In support of his ongoing avoidance of frivolous suits, petitioner requests the Court's attention

merits, which is fiction.

Likewise, the Third Circuit bends the fact base by misrepresenting that the trial court judge "dismissed the earlier case for lack of subject matter jurisdiction." This is not true: there was no dismissal. (Exhibit H) In fact, inherent in these prior proceedings is the district judge's multiple avoidances of any deciding with prejudice, and moreso, avoidance of using the word dismissal, making instead unusual statements like " . . forma pauperis is DENIED . . . The Clerk of Court shall mark this case CLOSED statistically." (Exhibit H) This caused doubt and has lent an air of superfluity to the sequence of the case despite such being the work of said wording by the Judge, not anything done by the plaintiff. More than once, plaintiff was caused to have to explain his actions where said action was negatively affected by the language used in the concluding orders. On appeal, plaintiff was subjected to the constant question of whether the orders stood as final orders. Dismissal without prejudice is neither final nor appealable, Borelli v. City of Reading, 532 F.2d 950, 951 (3d Cir.1976), and payment of the fee after denial of forma pauperis is a right. Billman v. Indiana D.O.C. C.A.7 (Ind.) 1995, 56 F.3d 785.

The Third Circuit also abuses discretion by deciding to affirm where it is evident in the docket,

that the district court's surprise dismissal of the action is an express showing of attempted prevention of further expansion of the record. This exhibits the express appearance of applying a convenient reason for dismissal, in an attempt to correct for an ongoing assumption that the trial fee would not be paid, but rather, that petitioner would attempt to appeal in forma pauperis. Plaintiff had applied to appeal in forma pauperis in the three prior cases before the same Judge, as opposed to paying the fee.

Sadly, both deciding Courts have ignored the inclusion of Marjorie Zitomer, personal representative, as a party, which precludes law of the case by way of the cases mentioned as precluding petitioner's capacity to sue for the estates. Had this case gone much further, this party was extremely likely of retaining counsel and thus overcoming any obstacles based on lack of counsel .[3] Moreso, she is one of three personal representatives of the George H. Schneller estate as well, and is a citizen of another state.

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to petitioner's victory in getting onto the ballot in Pennsylvania despite a concerted effort by litigants opposing his nomination petition in the Pennsylvania Commonwealth Court. 645 MD 2010.

[3] This new facet of the issue regarding a bar to pro se litigating on behalf of deceased parents/trust beneficiaries would bear on the rehearing of certain other cases, requested in this petition.

In addition to the abuse of discretion claimed in the trial Court's finding against jurisdiction over the 42 USC § 1985 claims for lack of state actors, which is not a requirement for these type of claims, the district Court is avoiding, and causing absence during review, of the diversity jurisdiction in regard to defendant Lilienthal.

Coming around full circle, abuse of discretion is clearly evident for the lower Courts' blatant omitting of the tolling of the statutes of limitations that obviously occurs pursuant to plaintiffs' invocation of Pennsylvania's one-year savings statute, 42 Pa.C.S.§5535. Moreso, and in a subject hoped to bring the Court's heightened attention to this petition, petitioner has claimed tolling of the limits of time pursuant to a state courts' egregious mishandling and deprivals of rights in a case that was filed by plaintiffs in 2004, within the much espoused two-year limit of time for injuries and death to the person, and pursuant to the filing of the first complaint in this matter, in the district court, during the pendency of that case.

The avoidance of review, and debilitating and erroneous determinations, before and after request for review, inflicted below, should in no way be ameliorated by time, including the time spent in this Court and this Court's decision to not review the prior case.

II. The Third Circuit has failed to address, or has caused absence of review, of an integral and substantial question of disqualification of the deciding trial judge. Review is requested of the apparent affirming of the District Court denial of motion to recuse.

The Third Circuit has clearly affirmed despite the fact that numerous questions were highly worthy of their review, and in the greatest portion, worthy of remand for expansion of the record, giving at least an opportunity to petitioner to testify and/or submit affidavits, and a brief. The Third Circuit has failed to address an integral and substantial question of recusal, which was formally requested in the motion filed for relief from the surprise order ending the case.

Petitioner, for purposes of this petition, contends that the record in this petition and appendix alone show that the district court judge clearly had a duty to recuse. The judge's refusal to do so warranted the intervention of the Third Circuit, and now warrants the Court's exercise of authority.

Petitioner in fact requested assignment of a different Justice verbally, when the clerk informed him of the Judge's identity, at the time of filing of the complaint. Third CircuitLocal Rule L.A.R. 40.1 clearly intends that fairness and prevention of bias

occur in the random assignment and that economy and justice be the result of any repeat assignments.

Petitioner claims that no matter the talent and experience of a Justice, when successive cases accumulate before the same judge, it is the orders, and findings and conclusions, issued in those cases, that give the best insight into a claim of prejudice, partiality, and bias. In this case there would be little doubt, including to laypersons and the legally untrained, that disqualification is abundantly needed.

Petitioner fully pled the issue, and it is telling that the district judge devoted his longest discussion in any issue, to this question. (Exhibit B) The discussion reveals a need for an impartial fact finder, as the trial Judge has denied all of the facts claimed by plaintiffs. Plaintiffs are certain that the Judge's 'impartiality might reasonably be questioned' " Liteky v. United States, 510 U.S. 540, 548 (1994), that a reasonable person, knowing all of the facts and circumstances, would harbor doubts concerning the judge's impartiality. Blanche Rd. Corp. v. Bensalem Township, 57 F.3d 253,266 (3d Cir. 1995), and continued impartiality. Alexander v. Primerica Holdings Inc.- 10 F.3d 155,164 (36 Cir. 993) .

The trial judge clearly was fully knowledgeable of

the prejudice, and the damage to cases and intended justice, that was occurring, and of the obstruction and impoverishment heaped on petitioner by defendants in certain of his cases, and other parties, yet even when disqualification was expressly requested, he chose to deny the request.

Even the clerk's failure to docket the complaint in this appeal stands as evidence of the trial judge's partiality or even inappropriate interference, where the numerous prior complaints were docketed, at least as exhibits with the accompanying forma pauperis applications.

The error and all evidence in favor of remand for proceedings or for reversal with instructions, that is stated in question I, is requested to be viewed cumulatively with other decisions by the same appeals Court and the same District Justice.

For this reason, review of this question of recusal would benefit from the record in petition No. 10-144 (as to which a petition for rehearing is filed herewith), and also from petition No. 10-227, Schneller v. Prospect park N.R.C., denied October 18, 2010, and petition No. 10-120, Schneller v. Fox Subacute, which is scheduled for conference on October 29, 2010. The district Judge's error and

express partiality have accumulated before this Court and rehearing is thus amply supported in all of these cases, at the least for the bringing in of those facts for purposes of the disqualification issue, although the cumulative error among the cases, including evidence in favor of disqualification, causes a greater reason for rehearing, in each specific case, because the acts of the trial Judge have been revealed to be part of a set of egregious acts.

Petitioner likewise directs the Court's attention to the petition for writ of certiorari from Third Circuit case No. 09-3855, Schneller v. Crozer-Chester Medical Center, filed on October 18, 2010.

VII. CONCLUSION

Petitioner has not raised the numerous sub-issues of the case, in this petition. This case deals with deprivals of civil rights including the very rights to defend life and to seek urgent medical care, outrageously deprived to a plaintiff. With utmost of respect, a threshold matter exists which alone shows the need for reversal, disqualification, and review of the constitutionality of a local rule that the appeals court has relied for their decision, namely, trial

court redesignation of denial of forma pauperis, as a dismissal, in a surprise order, and an appeals court, in the same mode, again redesignating the denial of a forma pauperis in a highly unusual manner.

The Court of last resort has decided in a way that conflicts with the United States Constitution and with decisions of the Third Circuit Court of Appeals and other Circuit Courts, and this Court. There is in the Orders a furthering of deprival of access to justice, remedy for injury, and deprival of property to plaintiffs, in derogation of the United States Constitution. Injustice is apparent. To perform its high function in the best way, justice must satisfy the appearance of justice. In re Murchison, 75 S.Ct. 623 (U.S.Mich.,1955) Access to the courts encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all the charges brought against him or grievances alleged by him. Com. ex rel. Matherly v. Frame, 21 Chest. 283 (Pa.Com.Pl.,1973)

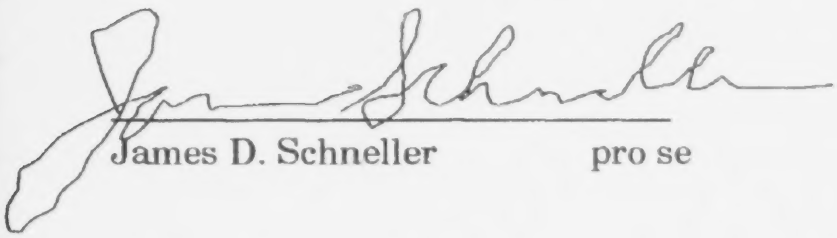
Petitioner, for the above reasons, respectfully requests an order granting certiorari over this case, and review of the orders entered in the Court of appeals, so that a fair and just determination may be made.

Petitioner, for the above reasons, respectfully requests an order finding Third Circuit L.A.R. 27.4 to be unconstitutional and invalid.

Petitioner, in the alternative, requests that the Court vacate the affirming the order of the District Court by the 3d Circuit, and requests additionally and/or in the alternative , remand with instructions in line with the Court's findings and conclusions.

Petitioner requests grant of writ of certiorari or such action deemed appropriate so that the question of disqualification of the trial judge may be granted a full and fair adjudication.

Petitioner also requests, in conjunction with the request for rehearing in prior appeal in this matter No. 10-144, rehearing also of petition No. 10-227, and petition No. 10-120, which is scheduled for conference on October 29, 2010.



James D. Schneller pro se

Date: October 25, 2010

VIII. TEXTS OF PERTINENT STATUTES

Third Circuit L.A.R. 27.4

27.4. Motions for Summary Action

A party may move for summary action affirming, enforcing, vacating, remanding, modifying, setting aside or reversing a judgment, decree or order, alleging that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action. In addition, the court may *sua sponte* list a case for summary action.

Source: Third Circuit Internal Operating Procedures 10.6 (1990)

Cross-references: 28 U.S.C. §2106; FRAP 27; Third Circuit Internal Operating Procedure 10.6 (1994)
Committee Comments: No substantive change from current practice or IOP 10.6 is intended. The filing of a motion for summary action does not stay the regular briefing schedule set forth in FRAP 31(a).

APPENDIX

CLD-245 NOT PRECEDENTAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.10-1681

JAMES D. SCHNELLER, HEIRS AND
BENEFICIARIES OF
MARJORIE C. SCHNELLER ESTATE OF
MARJORIE C. SCHNELLER
ESTATE OF GEORGE H. SCHNELLER,
Appellants

v.

ABLE HOME CARE INC.; **A**
MARIANNE LILIENTHAL;
HOLLY NELSON; JANE DOE 1
(sic)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 09-cv-05747)
District Judge. Honorable Lawrence F. Stengel

Submitted by the Clerk for Possible Summary Action
Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
July 15,2010
Before: BARRY, FISHER and GREENAWAY, JR.,
Circuit Judges

(Opinion filed. July 26, 2010) PER CURIAM

Appellant James D Schneller, proceeding pro se, appeals from the District Court's dismissal of his action. For the reasons that follow, we will summarily affirm the judgment of the District Court.

On December 2, 2009, Schneller filed a motion to proceed in forma pauperis ("IFP") in the United States District Court for the Eastern District of Pennsylvania. His motion was assigned to District Judge Lawrence Stengel, who has presided over a number of lawsuits filed by Schneller on behalf of himself and the heirs and beneficiaries of Marjorie Schneller, among others. According to Judge Stengel, attached to the motion to proceed IFP was a proposed complaint identical to a complaint filed against the same parties in early 2008.[1] See Civ. No. 08-cv-01003 (E.D. Pa.). Schneller's previous. complaint alleged that on June 27,2001, defendants

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[1] The proposed complaint in this case was never filed by the District Court and, therefore, is not available electronically. The IFP motion identifies Able Home Care, Inc., Marianne Lilienthal, Holly Nelson, and Jane Doe 1 as defendants in the proposed civil action. These are the same defendants named in Schneller's prior complaint Because Schneller does not dispute the District Court's characterization of the complaint as identical to the one he previously filed in 2008, we will assume that it is.

conspired to cause harm to and infringed upon the constitutional rights of Marjorie Schneller, his now-deceased mother. Schneller named as plaintiffs himself l the heirs and beneficiaries ofMarjorie C. Schneller, and the estates of his deceased parents, Marjorie and George Schneller

In the prior action, Civ. No. 08-cv-01003 (E.D. Pa.), Schneller filed a motion to

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proceed IFP and a proposed complaint. The District Court denied Schneller's motion to proceed IFP and noted without elaboration that "a preliminary review of plaintiff's complaint shows that this Court lacks jurisdiction over any of his claims." The Court ordered that the case be marked statistically closed. Schneller subsequently paid the filing fee of $350.00 in the prior case and sought to proceed, but the District Court noted that it had already dismissed the case and Schneller had failed to appeal. Several months later, Schneller filed a motion for leave to proceed IFP on appeal, which the District Court denied, concluding that Schneller could afford to pay the filing fee. We then granted Schneller leave to appeal without paying the filing fee and, in July 2009, dismissed his appeal from the District Court's denial of his motion to proceed IFP on appeal pursuant to Fed. R. App. P.24. It appears that

Schneller has attempted to resurrect his prior action by filing his motion to proceed IFP and proposed complaint in the instant action.

On December 14, 2009, the District Court issued an order denying Schneller's motion to proceed IFP and dismissing the case in its entirety. In doing so, the Court held that it had dismissed Schneller's prior action for lack of subject matter jurisdiction, as there were no state actors involved, and that, even if the claims were properly before the Court, they would be time-barred. Schneller timely filed a motion for reconsideration, arguing that the Court had both federal question and diversity jurisdiction over his complaint and that the statute of limitations should be tolled under 42 Pa. Cons. Stat. Ann. § 5532. He did not offer any factual basis for these arguments. He also maintained

that Judge Stengel should have disqualified himself given his history of denying Schneller's IFP motions and dismissing his claims. The District Court denied his motions and Schneller timely appealed.[2]

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We may take summary action when we conclude that an appeal presents no

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[2] The District Court granted Schneller leave to proceed IFP on appeal.

"substantial question." See 3d Cir. LAR 27.4 & I.O.P. 10.6.

We have previously explained that as a pro se litigant, Schneller may not represent parties other than himself See Schneller v. Prospect Park Nursing & Rehab. Ctr., 2010 WL 763642, at *1 n.1 (3d Cir. Mar. 8, 2010); Schneller v. Fox Subacute at Clara Burke, 2010 WL 763624, at *1 n.l (3d Cir. Mar. 8, 2010); Schneller v. Crozer Chester Med. Ctr. , 276 F. App'x 169, 170 n.1 (3d Cir. 2008); Schneller v. Fox Subacute at Clara Burke, 317 F. App'x 135, 137 n.1 (3d Cir. 2008); see also Osei-Afriyie v. Med. Coll. Of Pa., 937 F.2d 876, 882-83 (3d Cir. 199l) (holding that non-lawyer proceeding pro se could not represent his own children); 28 U.S.C. § 1654 (parties may proceed in federal court "personally or by counsel"). Accordingly, we will treat Schneller as the sole appellant in this appeal.

Much of the confusion in this case stems from the District Court's failure to follow the proper procedure in this and other cases filed by Schneller. As we have previously explained, motions to proceed IFP must be assessed in a two-step process. "First, the

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district court evaluates a litigant's financial status

and determines whether (s)he is eligible to proceed in forma pauperis under § 1915(a). Second, the court assesses the complaint under [§1915(e)(2)] to determine whether it is frivolous." Roman v. Jeffes 904 F.2d 192, 194 n.1 (3d Cir. 1990) (citing Sinwell v. Shapp, 536 F.2d 15 (3d Cir. 1976)). In this case, as in Civil No. 08-cv-01003, the District Court denied Schneller's motion to proceed IFP, presumably based on his financial situation, but then proceeded to discuss the merits of his complaint. When a district court denies leave to proceed IFP, however, the complaint is not before the court. Because the District Court here reached the merits of his complaint, we will construe its December 14, 2009 order as granting Schneller leave to proceed IFP and dismissing his complaint under 28 U.S.C. § 1915(e)(2)(B).

We have also held that a district court ought not dismiss a pro se complaint without allowing the plaintiff leave to amend. See Grayson v. Mayview State Hosp.,, 293 F.3d 103, 114 (3d Cir. 2002) (explaining that plaintiffs proceeding IFP 'who file complaints subject to dismissal under Rule 12(b)(6) should receive leave to amend unless amendment would be inequitable or futile"); Oatess v. Sobolevitch, 914 F.2d 428, 430 n.5 (3d Cir. 1990) ('We have observed that a district court might, sua sponte, raise the issue of the deficiency of a complaint under

Rule 12(b)(6), so long as the plaintiff is accorded an opportunity to respond."). While the District Court did not follow these precepts, Schneller has had, and has taken, several opportunities to respond to the District Court's order of dismissal. None of his responses has revealed any flaw with the District Court's

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reasoning that it lacked subject matter jurisdiction over his complaint. We will therefore summarily affirm the judgment of the District Court. See 3d Cir. LAR 27.4; 1.0.P. 10.6.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

HEIRS AND BENEFICIARIES OF
MARJORIE C. SCHNELLER, et al
Plaintiffs CIVIL ACTION

v. NO.09-5747

ABLE HOME CARE, INC, et al.
Defendants

B

FILED JANUARY 19, 2010

ORDER

AND Now, this 19 Day of January, 2010, upon consideration of the plaintiffs' "motion for relief from the Order dismissing the case and request for disqualification" (Document # 3), it is hereby ORDERED that the motion is DENIED.[1]

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[1] The plaintiff seeks relief from the dismissal of this action which I dismissed on December15, 2009, for lack of subject matter jurisdiction, and in the alternative, as alleging claims which were clearly outside of the statute of limitations. See Document #2. Granting a motion for reconsideration is appropriate 'if the party seeking reconsideration shows at least one of the following grounds.- (1) an

intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . , or (3) the need to correct a clear error of law or factor to prevent manifest injustice. Max's Seafood Cafe ex rel. Lou-Ann Inc. v. Quinteros, 176 F3d 669, 677 (3d Cir. 1999). The plaintiff has shown none of those grounds There was no intervening change in the controlling law, no flew evidence presented, or no clear error of law or fact in my previous Order dismissing the action.

The plaintiff also seeks, pursuant to 28 U.S.C. § 455, the count's disqualification from the case. Under 28 U.S.C. § 455(a), a judge should recuse himself "in any proceeding in which his impartiality might reasonably be questioned" In deciding a motion for recusal, the court must apply an objective standard. Edelstein v. Wilentz, 812 F.2d 128, 131 (3d Cir. 1987) "Quite simply and quite universally, recusal [is] required whenever 'impartiality might reasonably be questioned' " Liteky v. United States, 510 U.S. 540, 548 (1994). The proper inquiry is not whether the moving party subjectively believes the judge has some preconceived bias or prejudice, but rather whether a reasonable person, knowing all of the facts and circumstances, would harbor doubts concerning the judge's impartiality." Blanche Rd. Corp. v. Bensalem Township, 57 F.3d 253,266 (3d Cir. 1995). As explained by the Third Circuit, 'the appropriate - and the only -- inquiry to which we must respond is 'whether a reasonable person, knowing al the acknowledged circumstances, might question the district court judge's continued impartiality.'"

BY THE COURT

/s/
LAWRENCE F. STENGEL, J.

Alexander v. Primerica Holdings Inc.- 10 F.3d 155,164 (36 Cir. 993) After a review of my findings in the several actions filed by this plaintiff, I find that a well-informed and reasonable person would not question my continued impartiality. Accordingly, I will deny the motion in its entirety.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

HEIRS AND BENEFICIARIES OF MARJORIE C. SCHNELLER, et al.,
Plaintiffs

NO. 09-5747

ABLE HOME CARE, INC, et al.,

Defendant

C

FILED DEC 15 2009

ORDER

AND NOW, this day of December 2009, upon consideration of the plaintiffs' motion to proceed *in forma pauperis* (Document #1), it is hereby ORDERED that the motion is DENIED.

IT IS FURTHER ORDERED, upon review of the proposed complaint attached to the motion, that this case is DISMISSED in its entirety.[1]

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[1] The plaintiffs attach to their motion a proposed complaint which is a copy of the complaint filed against the same parties in early 2008. Sec 08-cv-1003. The complaint alleges constitutional violations pursuant to 42 U.S.C §§ 1983, 1985(2), and 1985(3). On March 10,

BY THE COURT

/s/
LAWRENCE F. STENGEL, J.

2008, there being no state actors involved see American Mfrs Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999), I dismissed the earlier case for lack of subject matter jurisdiction. Id. (Document #3). The plaintiffs failed to file a timely appeal. Accordingly, I will dismiss this case in its entirety.

Further, the alleged controversy relates to events which occurred in 2002. The statutes involved here are subject to the statute of limitations prescribed for personal-injury actions in the state in which the relevant events occurred. Lake v. Arnold, 232 F.3d 360, 368 (3d Cir. 2000). Pennsylvania's personal-injury statute of limitations is two (2) years. Voitasek v. Diocese of Allentown, 916 A.2d 627, 640 (Pa. Super 2006); 42 Pa.C.S.A. § 5524(2). Thus, these claims would also be time barred if they were properly before me.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1716

HEIRS AND BENEFICIARIES OF MARJORIE C. SCHNELLER, JAMES D. SCHNELLER, TRUSTEE AD LITEM; ESTATE OF MARJORIE C. SCHNELLER, MARJORIE ZITOMER, PERSONAL REPRESENTATIVE; ESTATE OF GEORGE H. SCHNELLER

v

D

ABLE HOME CARE INC.; MARIANNE LILIENTHAL; HOLLY NELSON; JANE DOE 1

James D. Schneller, Appellant

SUR PETITION FOR REHEARING

Present. SCIRICA Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH,

FISHER, CHAGARES, JORDAN, HARDIMAN,
Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith Circuit Judge

Dated: August 17,2009

tmm/cc: Mr. James D. Schneller
Holly Nelson
Marianne Lilienthal

DLD-226 June 25, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 09 - 1716

HEIRS AND BENEFICIARIES OF MARJORIE C. SCHNELLER

v. **E**

ABLE HOME CARE INC.; ET AL
James D. Schneller, petitioner
(E.D. Pa.. Civ. No. 08-cv-01003)

Present: BARRY, AMBRO and SMITH, Circuit Judges

Submitted is the Clerk's Order for Possible Dismissal Pursuant to 28 USC § 1915 or summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 in the above-captioned case

Respectfully

Clerk

MMW / MJC / tyw

ORDER

The foregoing appeal is dismissed. See Callihan v. Schneider, 178 F.3d 800, 804 (6th Cir.1999) ("Any appeal from an order denying pauper status on appeal will not be entertained and shall be dismissed sua sponte."); Fed. R. App. P.24(a)

By The Court,

/s/ D. Brooks Smith
Circuit Judge

Dated: July 21, 2009
tyw/cc: Mr. James D. Schneller

Holly Nelson

Marianne Lilienthal

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HEIRS AND BENEFICIARIES OF MARJORIE C. SCHNELLER, et al Plaintiffs

CIVIL ACTION

V NO. 08-1003

F

ABLE HOME CARE INC. et al

Defendants

ENTERED
DEC 2 2008
CLERK OF COURT

ORDER

STENGEL, J.

AND NOW, this 1st day of December, 2008, upon consideration of the plaintiffs' motion for "relief from the Order denying the motion for extension of

time. for service" (Document #9), it is hereby ORDERED that the motion is DENIED.[1]

BY THE COURT:

/s/ LAWRENCE F. STENGEL, J

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[1] As indicated in the Order dated November 13, 2008, I dismissed this case on March 10, 2008 for lack of jurisdiction. See Document #8. I also denied thc plaintiffs' motion to proceed *in forma pauperis* See Document #3. The plaintiffs failed to appeal. Contrary to the plaintiffs' assumption, the subsequent paying of thc filing fee had no affect on the case's dismissal.

FILED NOV 13 2008

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

ENTERED
NOV 13 2008
CLERK OF COURT

HEIRS AND BENEFICIARIES
OF MARJORIE C. SCHNELLER, et al
Plaintiffs

CIVIL ACTION
NO. 08-1003

v.

G

ABLE HOME CARE INC. et al
Defendants

ORDER

STENGEL, J.

AND NOW, this 13th day of November, 2008, upon consideration of the plaintiffs' motion for extension

of time for service (Document #5), it is hereby ORDERED that the motion is DENIED as moot.[1]

BY THE COURT:

/s/ LAWRENCE F. STENGEL, J

---

[1] On March 10, 2008, I dismissed this case. See Document #3. The plaintiffs failed to file a timely appeal. Accordingly, I will deny the motion as moot.

IN THE UNTTED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JAMES D. SCHNELLER, et al. : CIVIL ACTION

v. **H**

ABLE HOME CARE, et al. : NO. 08-1003

FILED MAR 10 2008

ORDER

AND NOW, this 10th day of March, 2008, plaintiff having filed a pro se civil action and a motion to proceed in forma pauperis in which he states that he is the beneficiary of a trust fund which "pays rent, utilities, $30/month medical insurance and medical co-pays; and $125/week to me," IT IS HEREBY ORDERED that plaintiff's motion to proceed in forma pauperis is DENIED for the reason that he has the financial means to pay the $550 filing fee to commence this civil action.

The Third Circuit Court of Appeals has stated that "it would be contrary to the spirit of (28 U.S.C. § 1915) 'to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution.' " Jones v. Zimmerman, 752 F.2d 76, 79

(3d Cir. 1985) (quoting Adkins v. Dupont Co., 335 U.S. 340 (1948). Nothing in this complaint suggests that the payment of the filing fee in this case would cause plaintiff to become completely destitute. Moreover, a preliminary review of plaintiff's complaint shows that this Court lacks jurisdiction over any of his claims.

ENTERED

MAR 1 1 2008

CLERK OF COURT

The Clerk of Court shall mark this case CLOSED statistically.

BY THE COURT:

/s/
LAWRENCE F. STENGEL, J.